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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS PENSION PLAN, WILLIAM WINPISINGER, EUGENE GLOVER and GEORGE KOURPIAS *as fiduciaries and trustees of the* INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS PENSION PLAN, *Petitioners,*

v.

FRANK MEAGHER, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") respectfully moves this Court for leave to file the accompanying brief as *amicus curiae.* In support of this motion, the Chamber shows as follows:

1. This motion is necessitated by the refusal of counsel for the Respondent to consent to the filing of a brief *amicus curiae* by the Chamber.

2. The Chamber is a federation of approximately 180,000 companies and several thousand other organizations, such as state and local chambers of commerce and trade and professional organizations. It is the largest association of business and professional organizations in the United States.

3. The Chamber regularly represents the interests of its member-employers in important employment and labor relations matters, vitally affecting those interests, before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the Federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor relations litigation. E.g., *Trans World Airlines Inc.* v. *The Independent Federation of Flight Attendants*, —— U.S. ——, 57 U.S.L.W. 4283 (1989); *Laborers' Health and Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988); *Golden State Transit Corp.* v. *Los Angeles*, 475 U.S. 608 (1986); *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985); *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519 (1979).

4. The instant case presents a precedent-setting issue of critical concern to the business community—*i.e.*, for the purposes of ERISA does the issuance of each monthly benefit check to a pensioner give rise to a new cause of action for additional benefits, and thus commence anew the running of the statute of limitations. Specifically, the Court must determine whether the applicable statute of limitations under ERISA, 29 U.S.C. § 1113(a), is to be expunged from the statute by allowing plaintiffs to challenge decisions made by plan trustees decades after these decisions have been made.

5. This issue is of vital concern to the Chamber and all its member-employers. The *sua sponte* decision

by the Ninth Circuit effectively dismantles the statute of limitations provisions of ERISA by holding that each pension check for a lesser amount issued to a plaintiff constitutes a fresh breach by the plan trustees, with the statute of limitations period running separately for each cause of action. The net result of this holding is that each pensioner can maintain a cause of action until his death.

6. The Ninth Circuit's decision in this matter represents a radical departure from what the Chamber, and its member employers, have understood to be well-settled principles with regard to limitations on actions under ERISA. If this decision is left intact, employers will never again be able to act with reasonable certainty that the decisions they make with regard to their pension plans will at some point cease being subject to challenge.

WHEREFORE, the Chamber respectfully requests that it be granted leave to file the accompanying brief *amicus curiae* in support of the Petitioner, International Association of Machinists and Aerospace Workers Pension Plan.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Ninth Circuit erred in creating a "continuing violation" theory of ERISA benefit claims by ruling that a separate and independent cause of action for employee benefits accrues, and a plaintiff's limitations period again begins running, each time an allegedly inadequate periodic benefit check is issued.

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICUS CURIAE

The interests of the Chamber of Commerce of the United States (the "Chamber") in this matter are set forth in the accompanying Motion for Leave to File Brief as *Amicus Curiae.*

STATEMENT OF THE CASE

This action was brought by Respondent Frank Meagher in the United States District Court of California pursuant to the Employee Retirement Income Security Act of 1974, as amended (hereafter "ERISA").

The International Association of Machinists and Aerospace Workers (hereafter the "Pension Plan" or "Plan") is a defined benefit pension plan sponsored by the International Association of Machinists and Aerospace Workers, AFL-CIO. In this case, the trustees of the Plan eliminated a very costly provision known as the "living pension" provision. This provision gave each pensioner an automatic increase in pension payments proportionate to any salary increase for the position from which the pensioner retired. Meagher, the former General Vice President of the union, and a member of its executive council, retired on July 1, 1977. As an active member of this executive council, Meagher was aware in the Spring of 1977 that the Plan had adopted the amendment eliminating the living pension provision. In addition, he, along with the other Plan participants, received written notice of the change in October of 1979.

Meagher filed an action challenging the elimination of the living pension provision. The applicable statute of limitations under ERISA, 29 U.S.C. § 1113(a), provides that any such action must be brought within six years from a breach or violation, or three years from the plaintiff's knowledge of the breach or violation, whichever is earliest. The Plaintiff filed his action on May 13, 1986 —well after the expiration of both possible statutes of limitation.

The District Court dismissed Meagher's claim on the grounds that the statute of limitations had run. On appeal, however, the U.S. Court of Appeals for the Ninth Circuit reversed. Instead of focusing on the date of the breach or on the date of Meagher's knowledge of the

breach, the lower court focused on the CONSEQUENCES of the alleged breach itself. The court, in a *sua sponte* decision, held that each pension check issued to the plaintiff "constitutes a fresh breach by the trustees . . . a separate cause of action arises with the issuance of each check, and the limitations period runs separately for each cause of action." 856 F.2d 1418, 1423 (9th Cir. 1988).

On December 1, 1988, the Ninth Circuit denied the Plan's petition for rehearing for *en banc* review.

SUMMARY OF ARGUMENT

The petition for writ of *certiorari* must be granted in this case because the Ninth Circuit's decision represents a novel and irrational departure from the long accepted interpretation of the ERISA statute of limitations. The lower court has effectively ignored the notion that limitation periods are a fundamental element of the American system of law, serving to protect both potential defendants, and the integrity of the judicial system itself.

Under the Ninth Circuit's application of the continuing violation theory, plaintiffs can maintain a cause of action as long as the consequences of the alleged breach remain in effect. This represents a dramatic change in how the theory is generally applied under other employee protective statutes where the focus is upon the time of the alleged act—not upon the time when the consequences of the act become painful. The practical effect of this decision is to create a sense of perpetual instability in the employee benefit system. Decisions regarding plan rules will remain forever subject to challenge, and employers will never have the security of knowing that their plans have been adequately funded. In a system that demands certainty, the Ninth Circuit has created uncertainty.

Finally, by eliminating the statute of limitations as a defense in actions challenging benefit decisions, the lower court is effectively increasing the burden on an already overloaded federal court system. Statistics indicate that

the federal court system is saddled with an overwhelming number of ERISA civil actions, and the dismantling of the time bar will only make the demands on the judicial system more onerous. Thus, for this reason, and those previously noted, a writ of *certiorari* must be granted.

ARGUMENT

I. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE *SUA SPONTE* DECISION BY THE NINTH CIRCUIT UNDERMINES THE TRADITIONAL SENSE OF STABILITY THAT IS PROVIDED BY TIME LIMITATION STATUTES

Time limitations for causes of actions are an integral part of the American system of law. These limitations have been of exceptional importance to the legal system since ancient times, as they define the time periods following the accrual of the right of action in which a litigant must assert his claim. The lower court's *sua sponte* decision, thus, has the frightening effect of dismantling the statute of limitation contained in 29 U.S.C. § 1113(a)—*i.e.*, of dismantling the limitations period intended to be included in the ERISA statute by Congress.

Although limiting the individual's right to pursue a legal action may, to some degree, seem harsh, statutes of limitation serve to protect three sets of interests vital to defendants and to society in general. The first, and primary, focus of the protection awarded by such a statute is fairness to the potential defendant.[1] By specifying a time period after which parties are no longer liable for a specific cause of action, statutes of limitation prevent parties from being subject to indefinite threats of lawsuits.[2] Essentially, these statutes serve as notice to a po-

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[1] *Determining Limitation Periods for Actions Arising Under Federal Statutes*, 41 Southwestern Law Journal 895, 897 (1987).

[2] There should be a time when the slate is "wiped clean of ancient obligations." *Special Project: Time Bars in Specialized Federal Common Law*, 65 Cornell Law Review 1011, 1016 (1980).

tential defendant of how long to preserve the information necessary to maintain a defense.

In the present case, the Ninth Circuit's decision completely ignores the importance of providing the party with such repose. The Ninth Circuit's continuing violation theory creates a sense of absolute uncertainty with regard to long-term plan liability. As a result of this decision, employers will never have the security of knowing that their plan has been adequately funded. In a situation that demands financial certainty, the lower court has created uncertainty.

Time limitation statutes also serve a second purpose—they preserve the integrity of the judicial system by allowing courts to focus on fresh claims.[3] In effect, the adoption and application of a statute of limitation prevents further overloading of an already burdened legal system.[4] A pensioner's ability to maintain a perpetual cause of action alleging inadequate pension payments only serves to saddle the court system with an even heavier load of ERISA civil actions. (See, infra p. 10 for statistics on the number of ERISA actions filed in the Federal court system).

Thirdly, society in general derives great benefit from the implementation and enforcement of time limitations.[5] Time bars preserve an employer's ability to engage in the regular course of business transactions, which, in turn, leads to greater stability in commercial relations.[6]

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[3] Statutes of limitation relieve courts "of the burden of trying stale claims when a plaintiff has slept on his rights." *Burnett* v. *New York Central RR*, 380 U.S. 424, 428 (1965).

[4] *Determining Limitation Periods*, at p. 898.

[5] *Id.*

[6] The legislative history supports the notion that retention of freedom in financial decision making is vital to the functioning of a pension plan. *Employee Retirement Income Security Act of 1974: Hearings on S. 4 Before the Senate Labor and Public Welfare Committee*, 93rd Cong., 4850 (Apr. 18, 1973).

Instead of providing such stability, however, the lower court's decision undermines the soundness in commercial relations that time bars are designed to protect. Employers must have the assurance that their decisions affecting benefit plans will, *at some point*, cease being subject to challenge. That is, that these decisions will become *final* and *binding*. Without such knowledge, employers will never be able to adequately fund their pension plans, thus compromising the notion of benefit security.[7]

II. THE LOWER COURT'S DECISION REPRESENTS A RADICAL DEPARTURE FROM THE WELL-SETTLED PRINCIPLES CONTROLLING THE APPLICATION OF THE CONTINUING VIOLATION THEORY UNDER OTHER EMPLOYEE PROTECTIVE STATUTES

The lower court's decision rests on a fundamental error in the application of the continuing violation theory to the instant case.[8] What the Ninth Circuit does is to create a continuing violation concept that allows a plaintiff to maintain a cause of action as long as the CONSEQUENCES of the alleged illegal pension decision remain in effect. In this case, the consequences of the plan trustee's decision to eliminate the living pension provision are alleged to occur each month upon receipt

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[7] Congress has never required employers to establish pension plans. By subjecting employers to indefinite liability for plan funding decisions, the Ninth Circuit is essentially providing a disincentive for employers to establish plans.

[8] In the Title VII area, the "continuing violation" concept is applied to modify the normal statute of limitations period in situations where an employer's discrimination exists prior to and during the limitations period. Crivens, *The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing*, 41 Vanderbilt Law Review 1171, 1172 (1988). The scope of the theory was first defined by this Court in the Title VII area in *United Airlines, Inc.* v. *Evans*, 431 U.S. 553 (1977).

of a pension check in a lesser amount. This represents a sweeping change in how the theory is generally applied under other employee protective statutes, for it goes beyond modifying the limitations period to ignoring the time bar completely.[9]

The Ninth Circuit's application of the continuing violation theory violates the fundamental principle established by this Court that "the proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts become painful." *Delaware State College* v. *Ricks*, 449 U.S. 250, 258 (1980), quoting *Abramson* v. *University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979). In *Delaware State College*, the Court evaluated the application of the continuing violation theory in the context of alleged discrimination in tenure decisions stating that, "the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks. That is so even though one of the effects of the denial of tenure—the eventual loss of teaching position—did not occur until later." 449 U.S. at p. 258.

Thus, this Court has been clear in its direction that a plaintiff cannot resurrect a stale claim simply by alleging that the consequences of an employer's decision constitute a separate cause of action. See, *Chardon* v. *Fernandez*, 454 U.S. 6 (1981).[10]

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[9] The continuing violation theory is generally limited to a series of related ACTS (emphasis added)—one of which falls within the limitations period. B. Schlei and P. Grossman, *Employment Discrimination Law*, 1047 (1982).

[10] Lower court decisions are consistent in affirming this notion that a present violation must occur within the limitations period before the continuing violation theory is triggered. *Hill* v. *AT&T Technologies, Inc.*, 731 F.2d 175, 179 (4th Cir. 1984) (". . . such an argument assumes that an allegation of a continuing violation constitutes a talismanic or shibboleth term automatically relieving a

These principles developed by the Court defining the scope of the continuing violation theory are not limited to the context of Title VII discrimination actions. With regard to actions under 42 U.S.C.A. sections 1981 and 1983, the lower courts have stressed the importance of identifying when "the reprobated act occurred." *Perez* v. *Laredo Junior College*, 706 F.2d 731, 734 (5th Cir. 1983).

Actions brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, have also adopted this same approach. In *Price* v. *Litton Business Systems*, 694 F.2d 963, 965 (4th Cir. 1982), the Fourth Circuit embraced the rationale of *Delaware State College*, holding that the "filing period runs from the time at which the employee is informed of the allegedly discriminatory employment decision, *regardless of when the effects of that decision come to fruition.*" (Emphasis added.)

Along these same lines, in suits brought pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, alleging denial of fair representation, courts have avoided applying the continuing violation theory to revive a valid, but non-cognizable, unfair labor practice charge. In fact, in *Metz* v. *Tootsie Roll*, 715 F.2d 299, 305 (7th Cir. 1983), the Seventh Circuit described the use of the continuing violation theory as follows:

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claimant of any obligation to comply with the statutory time requirements . . ."); *Milton* v. *Weinberger*, 645 F.2d 1070, 1075 (D.C. Cir. 1981) ("the continuing violation theory is limited to either a series of related acts, one of which falls within the limitations period or to the maintenance of a discriminatory system into the limitations period"); *Woodward* v. *Lehman*, 717 F.2d 909, 915 (4th Cir. 1983) ("only where ACTUAL VIOLATION (emphasis added) has occurred within the requisite time period . . . that the continuing violation theory is sustainable . . ."); *Cox* v. *United States Gypsum Co.*, 409 F.2d 289 (7th Cir. 1969) ("while plaintiff's most obvious injury occurred prior to the charge-filing period, there was another independent act of discrimination within the charge filing period.")

> . . . rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in receiving a legally defunct unfair labor practice."

See also, *Adams* v. *Budd Co.*, 846 F.2d 428, 432 (7th Cir. 1988), cert. pending (. . . even if there was a continuing violation, only complaints based upon conduct occurring within the six month proceeding are considered timely. . . .")

Finally, the continuing violation theory has been applied with this same care in the context of "whistleblower" actions under the Energy Reorganization Act of 1974, 42 U.S.C.A. § 5851(b)(1). The Fourth Circuit has held that ". . . the time of the challenged conduct is its notification rather than the time its painful consequences are ultimately felt . . ." *English* v. *Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988).

As these cases under other employee protective statutes indicate, a statute of limitation should not be rendered sterile through the application of the continuing violation theory. That is, a plaintiff should act in conformance with the well established rule of law that a cause of action accrues—and a limitations period commences running—when the violation occurs and not when its adverse aftereffects are first felt.[11] Without such conformance, time bars become merely ceremonial, and employers become subject to indefinite financial liability for the consequences of their actions.

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[11] For purposes of ERISA, a benefit claim generally accrues, triggering the limitations period, at the time a claim for benefits is denied. In limited situations, courts have determined that an action accrues from the time plaintiff had actual knowledge of the adverse action. See, Brief for Petitioner at 13-21, *International Association of Machinists and Aerospace Workers Pension Plan* v. *Meagher*, No. 88-1427 (March 1, 1989).

III. THE NINTH CIRCUIT'S DECISION WILL ONLY INCREASE THE WORKLOAD OF AN ALREADY OVERBURDENED FEDERAL COURT SYSTEM

Given the number of ERISA cases that continue to flood the federal court system, the role of time limitations on such actions demands great emphasis. For it is these time bars that act in promoting fairness for all potential parties to a suit.[12] In 1988, 6,704 ERISA civil actions were filed in the courts.[13] This is compared with 5,735 actions filed in 1986 and 4,502 actions filed in 1984.[14] Thus, this represents approximately a fifty percent growth in the number of actions commenced under ERISA in a four-year period.

Even more striking is the fact that, in 1988, ERISA actions accounted for over half of the suits commenced under all the federal labor statutes.[15] The demands of ERISA suits on the federal court system are already apparent, and the lower court's interpretation of 29 U.S.C. § 1113(a) would only serve to make this burden more onerous.

Moreover, unless this Court grants petitioner's writ of *certiorari*, and re-evaluates the Ninth Circuit's interpretation of 29 U.S.C. § 1113(a), plaintiffs will feel no pressure to file their action within the appropriate limitations period. Such a situation is not only inherently unfair to employers who must make their plan funding decisions based on economic realities, but is also inherently unfair to a federal court system already suffering under a load of ERISA civil actions.

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[12] This is consistent with the historical perspective on time limitations as preserving the integrity of the judicial system. *Supra*, note 3.

[13] *Statistics on ERISA Cases Filed During Years Ended June 30.* Administrative Office of the United States Courts, Statistical Analysis & Reports Division (unpublished).

[14] *Id.*

[15] *Reports of the Administrative Office of the U.S. Courts on Civil Cases Commenced by Nature of Suit* (1988), Table C-2A.

CONCLUSION

For the foregoing reasons, the Chamber urges the Court to grant the petition for writ of *certiorari*.

Respectfully submitted,

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